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Supreme Court, U. S.
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NO. 95-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KIRK M. BROWN
PETITIONER,

v.

THADDEUS KILGORE, JR.
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11 AFSCME/AFL CIO
STATE EMPLOYMENT RELATIONS BOARD,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

REPLY BRIEF OF PETITIONER

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BEST AVAILABLE COPY

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INTRODUCTION

This reply brief will address both the brief in opposition of Respondent State Employment Relations Board and the brief in opposition of Respondents Kilgore and Ohio Civil Service Employees Assoc.(O.C.S.E.A.).

THE ARGUMENT OF THE PETITIONER STANDS UNREFUTED. THE ARGUMENT OF THE RESPONDENTS IS NOT RELEVANT. THE ARGUMENT OF THE RESPONDENTS IS NOT WELL TAKEN AND CONTAINS MISSTATEMENTS OF FACT AND LAW

I. THE ARGUMENT OF THE PETITIONER STANDS UNREFUTED

The petitioner has shown that the duly passed laws of Ohio provide for the right to appeal a dismissal by the State Employment Relations Board (SERB Board) of an unfair labor practice charge for lack of probable cause (petition pg. 11-13). The respondents Have failed to address or refute this fact.

The petitioner has shown that the Ohio Supreme Court's decision in the case of *Ohio Assn.of Pub. School Emp. Chapter 643, AFSCME AFL-CIO v. Dayton City School Dist. Bd. Of Edn.*((1991),59 Ohio St. 3d 159) (hereinafter *OAPSE*) is repugnant to the duly passed laws of Ohio (petition pg. 10-15). The respondents have failed to address or refute this fact.

The petitioner has shown that the decision in *OAPSE* is precluded by the 14th Amendment to the Constitution of the United States (petition pg. 11-15). The respondents have failed to address or refite this fact as well.

U.S. Supreme Court rule 15 admonishes the respondents that they have an obligation to the court to point out any misstatements of fact or law set fourth in the petition. The respondent's briefs in opposition address no such perceived

misstatements. Averments are admitted when not denied pursuant to Federal Rule of Civil Procedure 8(d).

In the absence of any argument on the part of the respondents that addresses and refutes the clear argument of the petitioner, it is hereby respectfully submitted that this court should find that the argument in favor of granting Certiorari is well taken and stands unrefuted.

II. THE ARGUMENT OF THE RESPONDENTS IS NOT RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW OR TO THE ISSUES RAISED BY THE PETITIONER

The authorities that are relevant in this case are presented in the petition pursuant to Rule 14.1 (c) and (f). Respondent SERB at pages 2 and 3 and Respondents Kilgore and O.C.S.E.A. at pages 2-5 offer the argument that in a matter before the National Labor Relations Board (N.L.R.B.), a decision not to prosecute is not reviewable by a court. This argument ignores the applicable law in this case.

III. THE ARGUMENTS OF RESPONDENTS ARE NOT WELL TAKEN AND CONTAIN MISSTATEMENTS OF FACT AND LAW

The reliance by the respondents on the N.L.R.B.'s unreviewable discretion in the "instant context" (brief of SERB at page 2) is contrary to the holding of this court in the case of *Vaca v. Sipes* ((1967) 386 U.S. 171,17 L Ed 2d 842, 87 S. Ct. 903) where at pages 852-857 the Garmon pre-emption doctrine (Which gives the N.L.R.B. exclusive jurisdiction) is rendered inapplicable to a suit alleging a breach of a unions duty of fair representation. The case at bar also alleges a violation of the duty of fair representation on the part of the union and the chapter president as prohibited by Ohio Revised Code Chapter

4117.11 (B) (1). Therefore, the respondents reliance on a comparison to the N.L.R.B. is not well taken and the comparison actually supports the contention of the petitioner.

The statement of the case adopted by the respondents omits the fact that the Ohio Supreme Court denied the petitioner an appeal of right (petition page 10). It also obscures the facts of the case by referring to the case of *Ohio Assn. Of Pub. School Emp.,chapter 643, AFSCME, AFL-CIO v. Dayton City School Dist. Bd. Of Edn.* As *"Dayton"* (the appellee). The duty of the SERB Board to issue a complaint if it has probable cause is explained by the respondents as a restraint on the board unless it finds probable cause.

Respondent SERB at page 2 refers to"This Court and all of the United States Circuit Courts of Appeals that wave addressed the issue of Judicial Review in the instant context".However the issue of judicial review in the present case involves only the Ohio Public Employee Collective Bargaining Law (Ohio Revised Code Ch. 4117) and also Ohio's Administrative Procedure Act (O.R.C. Ch. 119). The issue of judicial review in the instant context has not been addressed by this court as respondent SERB claims.

Respondent SERB also refers to "the absence of any right to judicial review of SERB's dismissal of an unfair labor practice charge for lack of probable cause"(page 3), and to hornbook law that "any such rights exist only if provided by statute"(page 4 and 5). Petitioner counters that there is no "absence" of any right to judicial review in this case and that these rights are provided with redundancy in two of the duly passed statutes of Ohio (petition page 4-6 and 11-14).

Respondent SERB states on page 5 that the issues presented in the petition are issues that have been fairly, properly, and recently decided with clarity by the Supreme Court of Ohio. This statement is not true. The Ohio Supreme Court in *OAPSE* considered Ohio Revised Code Ch. 4117 only. It did not consider Ch. 119 (see dissenting opinion of Ohio Supreme Court Justice Douglass (petition page 15a "R.C. Chapter 119"). It also did not consider the 14th Amendment to the Constitution of the United States.

Respondent SERB argues at page 4 that the petition does not present a substantial federal constitutional question. The "absence" of a right of judicial review is referred to in a misstatement of petitioners argument. It is claimed that SERB's decision not to prosecute does not determine any private rights of any specified person. Petitioner counters that Question Presented No. II is a substantial federal question, and the argument in the petition from page 10 to 15 is an unrefuted argument regarding the substantial constitutional rights of tens of thousands of people in Ohio alone. The private rights of parties who come to the SERB Board are cited in this reply brief at page 3 and in the petition at page 4-6 and 11-14.

Respondents Kilgore and O.C.S.E.A. also claim at page 1 that no important question of federal law exists in this case which warrants review. This is also an unsubstantiated claim (see above).

CONCLUSION

There has been no sound argument to address and refute the argument for granting certiorari in this case. The arguments offered by the respondents are irrelevant to the issues of the case and are rife with errors.

The Ohio Supreme Court has disregarded the duly passed laws of the State of Ohio and the system of Checks and Balances in fashioning an inadequacy of remedies at law for this petitioner and tens of thousands of people in Ohio who serve the public.

The SERB Board is an untouchable state agency with exclusive jurisdiction and impunity to "not find" probable cause if it doesn't want to. This was not the intent of the General Assembly of Ohio when it created the SERB Board.

Petitioner respectfully submits that this case is worthy of this courts jurisdiction and that a summary judgement on the merits is appropriate in this case.

Respectfully submitted

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